

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DERRICK J. SMITH,	§
	§
Defendant Below-	§ No. 555, 2011
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 1101020846
Plaintiff Below-	§
Appellee.	§

Submitted: March 7, 2012

Decided: April 30, 2012

Before **STEELE**, Chief Justice, **HOLLAND**, and **BERGER**, Justices.

**ORDER**

This 30th day of April 2012, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) On July 14, 2011, the defendant-appellant, Derrick Smith, pled guilty to one count of Possession of a Firearm during the Commission of a Felony<sup>1</sup> and one count of Attempted Assault in the First Degree<sup>2</sup> (as a lesser included offense to the indicted offense of Attempted Murder in the First Degree). After a presentence investigation, the Superior Court sentenced

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<sup>1</sup> Del. Code Ann. tit. 11, § 1447A (2007).

<sup>2</sup> *Id.* §§ 531(2), 613(a)(5).

Smith on September 30, 2011 to a total period of fifty years at Level V incarceration to be suspended after serving thirty years in prison for decreasing levels of supervision. This is Smith's direct appeal.

(2) Smith's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Smith's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Smith's attorney informed him of the provisions of Rule 26(c) and provided Smith with a copy of the motion to withdraw and the accompanying brief. Smith also was informed of his right to supplement his attorney's presentation. Smith has raised several issues for this Court's consideration. The State has responded to Smith's points, as well as to the position taken by Smith's counsel, and has moved to affirm the Superior Court's judgment.

(3) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this Court must conduct its own review of the record and

determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.<sup>3</sup>

(4) Smith filed a three-page handwritten document raising four discernible issues for the Court's consideration on appeal. First, Smith complains that his sentence exceeded the sentence recommended by the SENTAC guidelines. Second, Smith contends that his sentence is so excessive that it violates the constitutional prohibition against cruel and unusual punishment. Third, Smith contends that his trial counsel rendered ineffective assistance due to an unspecified conflict of interest. Finally, Smith contends that he was never read his *Miranda* rights and was never given the opportunity to listen to his taped statement to the police.

(5) As a general rule, this Court's review of a sentence is limited to ascertaining whether the sentence is within the statutory limits.<sup>4</sup> While a defendant may challenge a sentence on the grounds that it is unconstitutional, based on false or unreliable information, or the result of judicial bias, Delaware does not provide for appellate review of punishments simply because the punishment deviates from sentencing guidelines.<sup>5</sup> In this case, Smith pled guilty to two class B felonies, with an authorized

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<sup>3</sup> *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

<sup>4</sup> *Siple v. State*, 701 A.2d 79, 83 (Del. 1997).

<sup>5</sup> *Id.*

sentencing range of two to twenty-five years at Level V imprisonment.<sup>6</sup> The Superior Court imposed the maximum twenty-five year sentence for each crime but suspended the sentence after Smith served thirty years of the total fifty-year sentence. While harsh, the sentence was within the statutory limits. Moreover, the Superior Court found aggravating circumstances to justify the sentence because the evidence reflected that Smith already was on probation at the time of his crimes and that he unduly depreciated the seriousness of the charges, which involved Smith firing a gun at a police officer at close range. Under the circumstances, we find no error in the Superior Court's departure from the sentencing guidelines,<sup>7</sup> nor do we find any merit to Smith's claim that his sentence is unconstitutional or was imposed by a judge with a closed mind.<sup>8</sup>

(6) Smith next claims that his trial counsel was ineffective due to some unspecified conflict of interest. This Court, however, will not consider a claim of ineffective assistance of counsel for the first time on appeal.<sup>9</sup>

(7) Finally, Smith argues that he was not read his *Miranda* rights, nor was he permitted to view the videotaped statement he made to police.

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<sup>6</sup> Del. Code Ann. tit. 11, § 4205(b)(2) (2007).

<sup>7</sup> *Siple v. State*, 701 A.2d at 83.

<sup>8</sup> *See Fink v. State*, 817 A.2d 781, 790 (Del. 2002).

<sup>9</sup> *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

By voluntarily entering a guilty plea, however, Smith has waived any right to object to alleged errors that occurred prior to the entry of his plea.<sup>10</sup>

(8) This Court has reviewed the record carefully and has concluded that Smith's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Smith's counsel has made a conscientious effort to examine the record and the law and has properly determined that Smith could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Randy J. Holland  
Justice

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<sup>10</sup> *Miller v. State*, 840 A.2d 1229, 1232 (Del. 2003).